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# In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 241

TOM WE SHUNG, BY HIS NEXT FRIEND, TOM WING, PETITIONER

*v.*

HERBERT BROWNELL, JR., ATTORNEY GENERAL OF THE UNITED STATES, AND WATSON B. MILLER, COMMISSIONER OF IMMIGRATION

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

## BRIEF FOR THE RESPONDENTS

### OPINIONS BELOW

The opinion of the Court of Appeals (R. 14–15) is not reported. The memorandum opinion of the District Court (R. 7–9) is reported *sub nom. Tom We Shung* v. *McGrath* at 103 F. Supp. 507.

### JURISDICTION

The judgment of the Court of Appeals was entered on July 2, 1953 (R. 16). The petition for a writ of certiorari was filed on August 7,

1953, and was granted on October 19, 1953 (R. 17). The jurisdiction of this Court is conferred by 28 U. S. C. 1254 (1).

### QUESTION PRESENTED

Whether, upon review of an exclusion determination of an Immigration Board of Special Inquiry by a federal district court in an action for a declaratory judgment—prosecuted by the alien over objection that habeas corpus is the only proper means of challenge—the merits of the judgment of the district court sustaining the exclusion may be considered by the court of appeals or whether the action must be dismissed by reason of lack of power of the court to review by declaratory judgment.[1]

### STATUTE AND REGULATION INVOLVED

The pertinent statutes and regulations are set forth in the Appendix, *infra,* pp. 46–54.

### STATEMENT

Tom We Shung, a Chinese alien (R. 10), sought admission into the United States on or about

[1] Petitioner based his petition for a writ of certiorari solely upon the ground that *Heikkila* v. *Barber*, 345 U. S. 229, limited review to habeas corpus and that dismissal without prejudice was accordingly required (Pet. 2, 4–5). After grant of the petition, petitioner has now injected into his brief additional, and basically inconsistent, arguments that *Heikkila* should be considered and reversed, and that the merits, instead of the narrow question of the court's power, should be reviewed. See *infra*, pp. 12–15. These new grounds are discussed *infra*, pp. 28–45.

November 28, 1947, at San Francisco, California, under the provisions of 8 U. S. C. 232 (Appendix, *infra*, pp. 51–52), as the blood son of one Tom Wing, an honorably discharged veteran of World War II (R. 1, 2). Hearings were held in January 1948 and February 1949 before an Immigration Board of Special Inquiry, which determined that Shung was inadmissible in that he had not established that he was the blood son of Wing (R. 2). On appeal to the Board of Immigration Appeals, the exclusion decision was affirmed (R. 3).[1a]

Subsequently, petitioner filed an action in the United States District Court for the District of Columbia, naming as respondents the Attorney General and the Commissioner of Immigration and Naturalization, for review of the order under the Administrative Procedure Act (5 U. S. C. 1001 *et seq.*) and for a declaratory judgment that the hearing accorded him in San Francisco was unfair, null and void and that he was in fact Wing's blood son and thus admissible. He based his action primarily upon the grounds: (1) the Board of Special Inquiry was improperly constituted in that it was composed of two immigration officials and a clerk-stenographer rather than three immigration officials, as allegedly required by law, and in that the Board was not composed of hearing examiners appointed in conformity with the Administrative Procedure Act, and (2)

[1a] Petitioner was released on bond and still remains at large under that bond.

the Board's finding that he was not Wing's blood son was not supported by any evidence whatsoever.

Respondents' answer alleged that the Board of Special Inquiry was properly constituted and that such boards were not required to be appointed in conformity with the Administrative Procedure Act. It denied that there was substantial evidence introduced at the hearing that petitioner was Wing's blood son. It further denied that the complaint stated a cause of action upon which relief might be granted or that the court had jurisdiction over the subject matter. (R. 4–5.)

The District Court dismissed petitioner's action (R. 10–11), issuing a memorandum opinion, findings of fact and conclusions of law (R. 7–10). It held that the Declaratory Judgment Act (28 U. S. C. 2201) allowed judicial review of the administrative determination here involved, such review to be limited to a determination of whether the statutory requirements had been met and whether there had been abuse of discretion in making the determination in question. The court found that the statutory requirements had been met and that the Board was properly constituted; that in any event, petitioner had waived any objection to the Board's composition when he failed to object at the time of the hearing; that petitioner had received a fair hearing; and that the

evidence adduced at the hearing amply supported the Board's determination. (R. 10.) On appeal,[2] the Court of Appeals unanimously affirmed (R. 16). Agreeing with the lower court's findings, it further said (R. 15):

> The recent decision of the Supreme Court in *Heikkila* v. *Barber*, 345 U. S. 229 (March 16, 1953), may suggest a serious question as to the right of judicial review of an exclusion order except by the limited process of habeas corpus. However, as appellant has been accorded the benefit of a full review and questions concerning validity of the administrative proceedings have been considered and resolved against him, it is unnecessary for us to consider the question now.

The elements of the record relating to the membership of the Board of Inquiry, and to the evidence concerning petitioner's claim of right to enter the United States, are set forth in connection with the discussion of these questions, *infra*, pp. 32–35, 37–38, 42–45.[3]

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[2] On May 1, 1953, after the April 17, 1953, argument in the Court of Appeals, petitioner filed a motion for reconsideration before the Board of Immigration Appeals. The Board affirmed its previous orders on August 11, 1953, after the July 2, 1953, judgment of the Court of Appeals, and after the petition for a writ of certiorari had been filed on August 7, 1953.

[3] The printed record in this Court consists only of the pleadings and the opinions of the courts below. Although petitioner has lodged a copy of the immigration file in his case with the Clerk of this Court, petitioner apparently felt no need to reproduce the file or any of its contents, including

## SUMMARY OF ARGUMENT

### I

Inasmuch as petitioner raised, essentially, only one question in his petition—whether the judgment of the District Court should be vacated and his complaint dismissed for want of jurisdiction—that is the only question before the Court. There is no basis for any argument that other questions were preserved by the petition or were raised by the respondents' memorandum in opposition. Accordingly, the additional five questions which petitioner attempts to inject into this case via his brief are not before the Court, and should not be reached, no matter what this Court's disposition of the question the petition actually raised.

### II

A. The respondents have consistently taken the position that the petitioner's complaint should be dismissed for want of jurisdiction.

B. Whether a court should consider jurisdiction before the merits presents difficult policy considerations. Although the general rule is that jurisdiction should be considered first, the fact is that for a variety of reasons, federal courts sometimes do consider the merits without deciding jurisdiction. However, in this case, where a re-

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the minutes of his hearing. He has, however, in his brief, referred to the contents of that file in presenting the additional issues. Br. 23, 39–40. Accordingly, where necessary we shall make like reference.

cent decision of this Court had unequivocally established that the District Court had no jurisdiction over the petitioner's complaint, and that fact was called to the attention of the Court of Appeals, the better procedure would have been for the court to consider the jurisdictional question before reaching the merits.

C. *Heikkila* v. *Barber,* 345 U. S. 229, clearly establishes that district courts have no jurisdiction under the Immigration Act of 1917, the Declaratory Judgment Act, or the Administrative Procedure Act to review exclusion orders in a declaratory judgment action.

D. (1) Although parties are generally estopped from assigning as errors contentions of their own which the courts have adopted, this principle does not apply where the issues are "jurisdictional." The constitutional and statutory restrictions on the jurisdiction of a federal court represent overriding considerations which the whims or mistakes of the parties cannot be allowed to affect. Thus, questions such as diversity of citizenship, jurisdictional amount, case or controversy, proper federal forum, nonreviewability of administrative action and sovereign immunity from suit may not be "waived" by the action or inaction of the parties. On the other hand, a party does lose the right, if it is not timely asserted, to challenge jurisdiction over the proper venue, the impropriety of the removal of a cause to a federal court,

and similar questions which do not represent such important considerations of policy.

(2) Here, the only substantial argument which might be made that the petitioner is estopped from contesting the jurisdiction of the District Court over the declaratory judgment action would be based upon an assimilation of this question to one of venue, as in the removal cases. But *Ahrens* v. *Clark,* 335 U. S. 188, is an insurmountable obstacle to such an argument. There, the petitioners sought relief by habeas corpus in the District of Columbia from an outstanding deportation order, although they were detained in the Southern District of New York. The Government was willing to waive any question whether the District Court had jurisdiction over such an action, but this Court refused to accept the waiver, holding that habeas corpus would lie only in the district of detention. In like manner here, the proper action to review the order of exclusion would be by writ of habeas corpus where petitioner might be detained. Thus, in light of *Ahrens* and *Heikkila,* it is clear that this action could not, under any theory, have been brought in the District of Columbia. Accordingly, the Court of Appeals should have vacated the judgment of the District Court and ordered the complaint dismissed for want of jurisdiction.

## III

Without retreating from our position that no other issue is properly before the Court, we shall

discuss briefly the other contentions petitioner has for the first time raised in his brief.

A. There is no merit to the argument that *Heikkila* v. *Barber* should be overruled. In the first place, petitioner presents nothing new which was not considered by this Court in that case. The issues decided in *Heikkila* were argued not once, but twice, in the past Term, and *Heikkila* itself was decided less than one year ago. Moreover, future exclusion or deportation proceedings will be controlled by the Immigration and Nationality Act of 1952 and not by the Immigration Act of 1917.

B. Petitioner is precluded from contending that the Board of Special Inquiry was improperly constituted in view of his failure to raise that contention before the board itself. *United States* v. *Tucker Truck Lines, Inc.*, 344 U. S. 33; *United States ex rel. Vajtauer* v. *Commissioner*, 273 U. S. 103. Petitioner's belated motion for reconsideration before the Board of Immigration Appeals and its opinion on that motion does not advance his cause. For, even if that opinion were to be considered as properly before this Court, the fact remains that the proper place to have made his objection to the composition of the Board of Special Inquiry was to that board. Adverse parties to administrative proceedings will be forced to prepare and try completely unnecessary litigation if objections to the composition

of the board or examiner which hears the evidence are not required to be made at the time of the actual hearing, when an error can still be corrected.

C. That the Board of Special Inquiry had as one of its members a clerk-stenographer is of no significance. The statute (8 U. S. C. 153) gives the Commissioner of Immigration and Naturalization, with the approval of the Attorney General. the power to designate the Board members. And the regulations promulgated under that authority expressly provide that persons designated as qualified may include "[a]ll other employees * * * whose supervisory officers assign to them the duty of acting as secretaries of such boards." 8 C. F. R. 60.29. Every court which has considered the question has approved the practice of designating clerks and stenographers to sit on such boards. Congress, by its failure to amend the statute until 1952, even though this practice was repeatedly called to its attention beginning in 1911, must be deemed to have accepted such an interpretation as proper during the intervening years.

D. Petitioner's contention that the change of the Board's personnel rendered the hearing unfair is without merit. The lower courts have uniformly held that such changes do not invalidate the hearings, and where, as here, the new members are completely familiar with all the

evidence in the record, which shows beyond dispute that petitioner's testimony was entitled to no weight at all, there is no prejudice from the change.

E. Section 7 (a) of the Administrative Procedure Act which pertains to the designation of hearing officers, provides that "nothing in this Act shall be deemed to supersede the conduct of specified classes of proceedings in whole or part by or before boards or other officers specially provided for by or designated pursuant to statute." Inasmuch as the Boards of Special Inquiry are specifically established by Section 17 of the Immigration Act of 1917 (8 U. S. C. 153), exclusion proceedings are, as the lower courts have unanimously held, exempt from the requirements of the Administrative Procedure Act. Both the legislative history and the purpose of Section 7 (a) accord with this construction.

Petitioner's argument that the Board of Special Inquiry violated the separation of functions requirements of Section 5 (c) of the Administrative Procedure Act, is equally without merit. For the above exemption of 7 (a) clearly extends to the applicability of Section 5 (c).

F. There is no merit to petitioner's contention that his hearing was unfair or that the decision was not supported by evidence. Both courts below examined the record carefully for these alleged errors and found none. An independent examination of the record leads to the same conclusion.

## ARGUMENT

Although in his brief petitioner has attempted to add several completely unrelated matters to the questions presented by his petition, there is only one question properly before this Court for its consideration: whether the Court of Appeals should have vacated the judgment of the District Court with instructions to dismiss the petitioner's complaint for want of jurisdiction rather than treating the issues on the merits. On this single issue the respondents agree that the answer is in the affirmative. If the other issues petitioner belatedly presents were to be reached in this proceeding, the decision of the court below should be affirmed.

### I

### THE ONLY ISSUE BEFORE THIS COURT IS WHETHER THE JUDGMENT OF THE COURT BELOW SHOULD BE VACATED AND THE CASE REMANDED TO THE DISTRICT COURT FOR A DISMISSAL OF THE COMPLAINT FOR WANT OF JURISDICTION

The petition for a writ of certiorari did not challenge the validity of the exclusion determination by the immigration Board of Special Inquiry nor the judgment of the court below in its affirmation of the substance or the merits of that determination. Petitioner's sole contention (Pet. 2, 5)

was that, in the light of this Court's decision in *Heikkila* v. *Barber*, 345 U. S. 229 (rendered after the judgment of the District Court), the Court of Appeals did not have jurisdiction to review the merits of the exclusion determination, but should have dismissed the action solely on the basis of lack of jurisdiction, rather than affirming the judgment of dismissal upon the merits.

The five-page Memorandum in Opposition filed by the respondents did not take issue with the contention that the courts below did not have jurisdiction over the merits of the complaint. Rather, it pointed to those considerations which, in our view, were factors demonstrating that the petition did not merit review by this Court: the fact that it was petitioner who had invoked the declaratory judgment avenue of relief and that petitioner had obtained a review of the outstanding exclusion order which was at least as extensive as, if not more so, than that which he would be able to obtain by a writ of habeas corpus. "In these circumstances, we [saw] no need to disturb the decision of court below." (Memorandum in Opposition, p. 5.)[4]

There was no hint in the petition that petitioner would attempt to urge before this Court any ques-

[4] Petitioner misreads that Memorandum when he suggests (Br. 22) that "the Government * * * devoted itself exclusively to the merits, * * * which may otherwise be before the Court by reason of the Government's argument in opposition to certiorari." The merits of the issues petitioner now attempts to raise were not argued in that Memorandum.

tion other than those expressly presented by the petition.[5] It is beyond dispute that this Court will consider only those questions presented by the petition for a writ of certiorari. See, *e. g., General Talking Pictures Corp.* v. *Western Electric Co.,* 304 U. S. 175, 177–179; *National Licorice Co.* v. *National Labor Relations Board,* 309 U. S. 350, 357, n. 2. Of course, this Court has power to notice "plain error not assigned or specified" (Rule 27 (6)), but petitioner's contention that *Heikkila* v. *Barber,* a case decided less than five months before the petition was filed, should be overruled—a condition precedent to this Court's reaching the remaining questions on the merits which the petitioner has added in his brief[6]—scarcely comes within the "plain error" category. Accordingly, the respondents strenuously urge that no question other than the jurisdictional issue is before the Court.

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[5] The Questions Presented were limited to the aforesaid jurisdictional questions. There was no Specification of Errors included in the petition. The Argument discussed only the jurisdictional issue.

[6] Petitioner devotes less than three printed pages of his 37-page Argument to the questions presented by the petition. The remaining 34 pages deal exclusively with the new questions.

## II

### THE JUDGMENT OF THE COURTS BELOW SHOULD BE VACATED AND THE CASE REMANDED TO THE DISTRICT COURT WITH INSTRUCTIONS TO DISMISS THE COMPLAINT FOR WANT OF JURISDICTION

#### A. THE POSITION OF THE RESPONDENTS

It has consistently been the position of the respondents, when the issue was properly joined, that the complaint should be dismissed for want of jurisdiction without passing on the merits of the case. This was the respondents' position in the District Court. Motion to Dismiss Complaint, pp. 9–10, United States District Court for the District of Columbia, Civil Action No. 276–50. It was likewise the position of the respondents in the Court of Appeals. Supplemental Brief for Appellee, pp. 2–3, 5–14, C. A. D. C. No. 11,417. As indicated, the Memorandum in Opposition to the Petition was not inconsistent with this position, and, after the petition had been granted, the Acting Solicitor General filed a letter with the Clerk of this Court stating that the respondents agreed with the petitioner's views on the only question presented by the petition, that the judgment should be vacated and the complaint dismissed for lack of jurisdiction.[7]

[7] The letter further suggested that the Court might wish to dispense with oral argument.

The question whether a court must in every case consider jurisdiction before it reaches the merits of a given controversy presents difficult policy considerations. It is true that the standard formulation of the principle is that "The first duty of the [federal] court is to make sure that jurisdiction exists."[*] See *Mansfield, C. & L. M. Ry. Co.* v. *Swan,* 111 U. S. 379; *Treines* v. *Sunshine Mining Co.,* 308 U. S. 66, 70. Certainly a court acting in orderly and logical fashion will first determine if it has jurisdiction before proceeding to other issues. It is, however, also true that as a practical matter federal courts sometimes do entertain cases on the merits without considering their jurisdiction to do so. There are doubtlessly a number of decisions on the merits spread throughout the federal reports where it could be shown that a decision on the jurisdiction would have required the court to dismiss the suit. Some of

[*] Hart and Wechsler, *The Federal Courts and the Federal System* (1953), p. 719. The text goes on:

> If the record fails to disclose a basis for federal jurisdiction, the court not only will but must refuse to proceed further with the determination of the merits of the controversy unless the failure can be cured. This is true whether the case is at the trial stage or the appellate stage, and whether the defect is called to the court's attention "by suggestion of the parties or otherwise." Probably it would be possible to fill the rest of this book [some 700 pages] with citations and thumbnail abstracts of case illustrating the application of this principle.

these decisions can be explained by the court's desire to avoid difficult jurisdictional problems where the merits are relatively simple. See, *e. g., Brooks* v. *Dewar,* 313 U. S. 354, 359–360; cf. *Secretary of Agriculture* v. *Central Roig Co.,* 338 U. S. 604, 619–620. Or, where a court recognizes the existence of the problem, it may, as did the court below, wish to terminate the litigation without prolongation by subsequent actions, provided that no unfairness to the litigants will result from such a determination.

In this case, however, this Court had decided the jurisdictional question without equivocation in *Heikkila,* and the issue had been called to the attention of the Court of Appeals. There was thus no difficult or open question of jurisdiction by the time the case reached that court. In these circumstances, despite the undesirability of relitigating matters which have already been decided and thus prolonging the litigation unnecessarily, we are of the view that there was no sound reason for the court below not to reach and dispose of the case on the jurisdictional issue before coming to the merits.

C. HEIKKILA *v.* BARBER

*Heikkila* v. *Barber,* 345 U. S. 229, is fully dispositive of the jurisdiction of the lower courts to decide this kind of case on a proceeding for injunction or declaratory judgment. There, the opinion of this court points out that, prior to the

Administrative Procedure Act, habeas corpus was the only remedy by which deportation orders could be challenged in the courts, and that attempts to use injunctions, declaratory judgments, and other types of challenge had been consistently rejected (*id.* at 230). In determining whether the word "final," as to the decisions of the Attorney General, would preclude judicial review and thus make the Administrative Procedure Act inapplicable, reference was made to the long history of the word "final," both in statutes and in decisions of this Court, and it was concluded (*id.* at 235):

> * * * Clearer evidence that for present purposes the Immigration Act of 1917 is a statute precluding judicial review would be hard to imagine. Whatever view be taken as to the breadth of § 10 of the Administrative Procedure Act, the first exception to that section applies to the case before us. The result is that appellant's rights were not enlarged by that Act. Now, as before, he may attack a deportation order only by habeas corpus.

Moreover, the Court's review of the history included instances of exclusion as well as deportation; the reasoning used to support the conclusion that the decision of the Attorney General is nonreviewable in a deportation case applies *a*

*fortiori* to a case involving an exclusion proceeding (*id.* at 233–234).[9]

D. WAIVER OR ESTOPPEL

Inasmuch as *Heikkila* v. *Barber, supra,* so clearly vitiates the basis of the jurisdiction assumed by the District Court, the only possible method of sustaining the judgment of the court below would be by an argument of waiver or estoppel based upon the fact that it was the petitioner who invoked the jurisdiction of the District Court for declaratory relief and that he cannot be heard now to contest that jurisdiction. Although the respondents thought it entirely proper to suggest this fact as a reason for urging that this Court, in the exercise of its discretion, deny certiorari to the petitioner, it does not lead to an affirmance of the judgment below on the merits.

(1) Any general theory of waiver or estoppel is, in the final analysis, based upon the evident unfairness of permitting one party to switch positions in the middle of litigation, when it is to his advantage to do so. Thus, there is usually little judicial hesitancy in preventing a litigant

[9] Nor do the decisions in *Perkins* v. *Elg*, 307 U. S. 325, and *McGrath* v. *Kristensen*, 340 U. S. 162, afford a basis for judicial review. *Heikkila* v. *Barber*, 345 U. S. 229, 236–237.

from arguing that it was error for a court to have accepted one of his own contentions. Cf. *Johnson* v. *United States,* 318 U. S. 189; *Boyd* v. *United States,* 271 U. S. 104.

This general and reasonable rule has not been applied where the issues are "jurisdictional." Federal courts are circumscribed by the Constitution and the federal statutes which give them jurisdiction. Important policy bases underlie these restrictions. For example, if it were not for this circumscription, the jurisdiction of federal courts (with few exceptions) would coincide with that of the state courts. For the parties to ignore the prescribed limitations and to invoke federal jurisdiction is to introduce into the federal judicial system matters reserved to the states, creating a problem in federalism. See *Healy* v. *Ratta,* 292 U. S. 263, 269–270. Thus, the doctrine has been developed that the requirement of diversity of citizenship cannot be waived by the parties;[10] and the same principle applies to the requirement of jurisdictional amount.[11]

Also fundamental to the jurisdiction of a federal court is the Constitutional command that

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[10] *Capron* v. *Van Noorden,* 2 Cranch 126; *Grace* v. *American Central Insurance Co.,* 109 U. S. 278, 283; *Robertson* v. *Cease,* 97 U. S. 646; *Mansfield, C. & L. M. Ry. Co.* v. *Swan,* 111 U. S. 379; *Mitchell* v. *Maurer,* 293 U. S. 237; *American Fire & Casualty Co.* v. *Finn,* 341 U. S. 6.

[11] *McNutt* v. *General Motors Acceptance Corp.,* 298 U. S. 178, 184; *North Pacific Steamship Co.* v. *Soley,* 257 U. S. 216, 221; *Wetmore* v. *Rymer,* 169 U. S. 115, 120.

there be a "case or controversy." This, too, cannot be waived.[12] Nor can there be a waiver of the statutory requirements that a particular type of case be tried in one federal forum rather than another, where Congress has distinguished between the two fora with particular ends in mind.[13] And of course where no review of particular administrative orders has been provided by Congress the failure of the administrative agency to contest jurisdiction does not give a federal court such jurisdiction to review.[14]

Another fundamental concept is that of the sovereign immunity of the United States from suit. This immunity does not depend upon the mistakes or choice of litigation strategy of any one Government attorney, but must ultimately depend upon the degree to which Congress has relaxed the immunity.[15]

This is not to say that there are no situations where the parties are not estopped to contest questions normally denominated "jurisdictional." Thus, jurisdictional limitations which are based

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[12] *McGrath* v. *Kristensen*, 340 U. S. 162, 167.

[13] *Ahrens* v. *Clark*, 335 U. S. 188.

[14] *United States* v. *Griffin*, 303 U. S. 226; *United States* v. *Corrick*, 298 U. S. 435; cf. *443 Cans of Egg Product*, 226 U. S. 172.

[15] *United States* v. *Shaw*, 309 U. S. 495, 500–501; *United States* v. *United States Fidelity Co.*, 309 U. S. 506, 513; *Finn* v. *United States*, 123 U. S. 227; *Case* v. *Terrell*, 11 Wall. 199.

on the convenience of the parties; *e. g.*, jurisdiction over the person [16] or venue,[17] may be waived. Further, collateral attacks upon judgments which were entered without jurisdiction are severely limited and do not lie to the same extent as do attacks which could be made upon a direct appeal.[18] Moreover, it cannot be gainsaid that in particular cases the courts have estopped a contesting of jurisdiction by reconstructing the action in order to preserve the jurisdiction.[19]

In sum, this Court has held that there exist large areas of federal jurisdiction which are controlled by such overriding policy considerations that they cannot be allowed to depend upon the whims of the particular litigants before the courts. There do exist other areas which do not require such rigid restraint, but, generally, those cases,

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[16] *Alexander* v. *Hillman*, 296 U. S. 222.

[17] *Ex parte Schollenberger*, 96 U. S. 369; *Neirbo Co.* v. *Bethlehem Shipbuilding Corp.*, 308 U. S. 165, 167–168.

[18] See, generally, Boskey, *Jurisdiction and Collateral Attack*, 40 Col. L. Rev. 1006.

[19] *E. g.*, the removal cases, see *infra*, pp. 24–27; *Ex parte Endo*, 323 U. S. 283 (removal of an applicant for habeas corpus from the district in which the petition was filed does not destroy jurisdiction over the cause); cf. *Morris* v. *Gilmer*, 129 U. S. 315 (removal of a party from a state to defeat jurisdiction unsuccessful).

Another category of cases where a party may be estopped from contesting jurisdiction is that where the wrong relief is sought, although the court has jurisdiction over the parties in other respects. *Mercelis* v. *Wilson*, 235 U. S. 579; *Beyer* v. *LeFevre*, 186 U. S. 114. Cf. *DiGiovanni* v. *Camden Fire Insurance Assn.*, 296 U. S. 64.

which have held that the litigant who invoked jurisdiction could not subsequently contest it, can be rationalized by the relatively minor importance of the facet of jurisdiction involved.

(2) It is against this background that this case must be approached. This Court has held that there is no jurisdiction in federal district courts over declaratory judgments to test the validity of deportation or exclusion orders. It might be argued, however, that since habeas corpus is the proper remedy, and since the elements are essentially the same (but cf. *Heikkila* v. *Barber*, 345 U. S. at 236–237), the mere mislabeling of the form of action should not be considered jurisdictional.

But this argument runs afoul of *Ahrens* v. *Clark*, 335 U. S. 188. There, the petition for writ of habeas corpus was filed in the District Court for the District of Columbia, although the petitioners were confined in the Southern District of New York. The respondent Attorney General was willing to waive the jurisdictional question, in effect assimilating the issue to one of venue. This Court rejected that contention, stating (335 U. S. at 193):

> Respondent is willing to waive the point, so that we may make a decision on the merits. But the restriction is one which Congress has placed on the power of the District Court to act. Hence it may not be

waived by the parties. *United States* v. *Griffin*, 303 U. S. 226, 229.

Accordingly, it seems clear to us that under *Ahrens* the parties cannot waive the jurisdictional limitations of the District Court over this type of attempt to seek review of exclusion or deportation orders, and if the point cannot be waived voluntarily it presumably cannot be waived involuntarily on any theory of estoppel.

It is true that in a somewhat analogous situation, the decisions have sustained unauthorized removals from state to federal courts, where the removing party has subsequently challenged the propriety of the removal. This result has been reached, not by the application of the statutory criteria of removal, but by treating the removal as if it were an original action in the federal court, and then by determining whether there would have been a basis for jurisdiction by reason of the nature of the subject matter and diverse parties, and the like.[20]

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[20] In *Baggs* v. *Martin*, 179 U. S. 206, where the receiver of a railroad removed an accident claim from the state court on grounds which "may" not have been "well founded" (*id.* at 208), he was not to be heard to object, since the federal court had jurisdiction of the railroad property and thus did not acquire jurisdiction solely by the receiver's consent (*id.* at 209). In *Handley-Mack Co.* v. *Godchaux Sugar Co.*, 2 F. 2d 435 (C. A. 6), removal of a breach of contract action by the defendant was held improper because the defendant was a resident of the state from which he obtained removal; but the court relied upon the fact that this would not have barred an original action by the plaintiff, who was a resident

The most recent and definitive case on this issue is *American Fire & Casualty Co.* v. *Finn*, 341 U. S. 6. There, this Court spelled out the limits of this sustaining of judgments by a species of estoppel. The removal there was improper because of non-separability of the claims sued upon against two fire insurance companies and their resident agent. The Court there stated (*id.* at 16–18):

> There are cases which uphold judgments in the district courts even though there was no right to removal. In those cases the federal trial court would have had original jurisdiction of the controversy had it been brought in the federal court in the posture it had at the time of the actual trial of the cause or of the entry of the judgment. That is, if the litigation had been initiated in the federal court on the issues and between the parties that comprised the case at the time of trial or judgment, the federal court would have had cognizance of the case. This circumstance was relied

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of a different state (*id.* at 436). In *Bailey* v. *Texas Co.*, 47 F. 2d 153 (C. A. 2), the removal by defendant was improper because the action was not between citizens of different states but between an alien and citizen. But since the court would have had jurisdiction of an original suit between an alien and citizen, jurisdiction was sustained (*id.* at 155). In *Toledo, St. L. & W. R. Co.* v. *Perenchio*, 205 Fed. 472 (C. A. 7), one of two defendant companies removed an action for personal injury, claiming a separable controversy. Upon dismissal of the other defendant and judgment for plaintiff, defendant claimed improper removal on the ground that the controversy was actually inseparable. Jurisdiction was sustained upon the ground of diversity of citizenship (*id.* at 474–476).

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upon as the foundation of the holdings. The defendant who had removed the action was held to be estopped from protesting that there was no right to removal. Since the federal court could have had jurisdiction originally, the estoppel did not endow it with a jurisdiction it could not possess.

In this case, however, the District Court would not have had original jurisdiction of the suit, as first stated in the complaint, because of the presence on each side of a citizen of Texas. 28 U. S. C. § 1332. The posture of this case even at the time of judgment also barred federal jurisdiction. A Texas citizen was and remained a party defendant. * * * By this decree the merits of the litigation against Reiss were finally adjudicated. The request of respondent to dismiss Reiss after the judgment was not acted upon by the trial court.

The jurisdiction of the federal courts is carefully guarded against expansion by judicial interpretation or by prior action or consent of the parties. To permit a federal trial court to enter a judgment in a case removed without right from a state court where the federal court could not have original jurisdiction of the suit even in the posture it had at the time of judgment, would by the act of the parties work a wrongful extension of federal jurisdiction and give district courts power the Congress has denied them.[21]

[21] Mr. Justice Douglas, with whom Mr. Justice Black and Mr. Justice Minton concurred, dissented, observing that the

It would thus appear that for this Court to sustain jurisdiction in the instant case would require that the action be treated not only as one applying for a writ of habeas corpus but also as having been brought in the district in which petitioner might be detained. Merely stating this proposition demonstrates that the removal analogy cannot be pressed so far as to include this case. The fact is that this action could not have been instituted in the District Court for the District of Columbia, no matter what its label. To hold that the petitioner here had waived his right to raise the jurisdictional issue would necessarily require an overruling of *Ahrens* v. *Clark*.[22]

In sum, the Government is of the view that, in accord with long-established views of the limitations of federal jurisdiction, and particularly in the light of *Heikkila* v. *Barber* and *Ahrens* v. *Clark*, the District Court had no jurisdiction in this case; that the Court of Appeals should first have examined that jurisdiction; and that the Court of Appeals should have concluded that the

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Texas defendant and the other nonresident defendant were dismissed from the case.

[22] It would also raise serious questions as to whether an indispensable party was before the court. Respondents here are the Attorney General and the Commissioner of Immigra- Accordingly, it is highly doubtful that the present respondents are the proper parties before the Court. See *Ahrens* v. *Clark*, 335 U. S. at 193.

tion. The writ of habeas corpus, however, normally must be directed to the applicant's custodian.

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judgment of the District Court should be vacated with instructions to dismiss the complaint for want of jurisdiction.

## III

### EVEN IF THIS COURT WERE TO REACH THE ADDITIONAL QUESTIONS PRESENTED BY PETITIONER'S BRIEF, THE CONCLUSIONS OF THE COURT BELOW WOULD BE SUSTAINED

Although the remainder of our brief is in fact devoted to a consideration of those points petitioner has raised in his brief but which were not even remotely suggested by his petition, we wish to emphasize again that these issues are not properly before the Court.

#### A. HEIKKILA *v.* BARBER SHOULD NOT BE OVERRULED

Petitioner now requests this Court to overrule *Heikkila* v. *Barber,* decided March 1953, less than a year ago. This contention is, of course, completely inconsistent with the question presented in the petition, which was based upon the validity of *Heikkila.* Without conceding for an instant that petitioner should be permitted so to expand and, indeed, shift his grounds after obtaining review by this Court (see *supra,* pp. 12–14), the Government respectfully refers to the considerations and arguments presented in its briefs in *Heikkila* (No. 426, Oct. Term, 1952), and in *Martinez* v. *Neelly* (No. 218, Oct. Term, 1952). More im-

portant, the Government relies upon this Court's own considered decision in *Heikkila*.

Moreover, we see no reason for this Court to reconsider *Heikkila* at this time. Apart from the fact that the question decided therein was briefed and argued not once, but twice, within the last Term, the facts are, as petitioner concedes (Br. 7, 20), that this case is completely governed by the Immigration Act of 1917 and that future litigation will turn on the proper interpretation of the Immigration and Nationality Act of 1952 (66 Stat. 163, 8 U. S. C. A. 1101, *et seq.*), which became effective December 24, 1952. Whether that Act alters in any way the scope and method of judicial review is before this Court in *Brownell* v. *Rubinstein*, No. 300, this Term, certiorari granted, November 9, 1953.[23] Accordingly, it seems clear that if the arguments petitioner seeks to make should be heard at all, they can be best presented by the parties to that case, and not in a reconsideration of *Heikkila*.

Finally, petitioner's suggestion that *Heikkila* was erroneously decided is without merit. The principal argument in his brief to that effect is based upon his contention that courts have considered statutory matters as well as Constitutional arguments in reviewing deportation or exclusion orders. But, regardless of that allegation, it

[23] It is the position of the Government that no change was effected by the 1952 Act.

seems uncontrovertible that the exclusive method of review of such orders has been by habeas corpus and that the Act of 1917 has been consistently interpreted as precluding review except by habeas corpus. Inasmuch as Section 10 (a) of the Administrative Procedure Act (Appendix, *infra,* p. 48) provides for judicial review "[e]xcept so far as * * * statutes preclude judicial review," it seems clear, as this Court held in *Heikkila,* that the Administrative Procedure Act had no effect on the review of deportation and exclusion orders.

B. PETITIONER IS PRECLUDED FROM RAISING THE ISSUE OF IMPROPER COMPOSITION OF THE BOARD OF SPECIAL INQUIRY SINCE HE FAILED TO OBJECT BEFORE THAT BOARD

Although petitioner was represented by counsel who was "particularly experienced and competent in such matters" (R. 8), he failed to object to the composition of the Board of Special Inquiry until he lodged his complaint in the District Court (R. 2). This failure to assert the alleged improprieties during the course of the administrative proceedings, the time when they might have been considered by the administrative authorities and corrected—if correction were in order—precludes him from judicial consideration of the issues so belatedly presented. *United States* v. *Tucker Truck Lines,* 344 U. S. 33.[24]

[24] This doctrine is as applicable to administrative proceedings before the Immigration and Naturalization Service as it

Petitioner's contention (Br. 29–34) that the defect was "jurisdictional" has no more merit than did the similar contention in *Tucker*. Nor, despite petitioner's assertions to the contrary (Br. 32), must there be a statute or administrative regulation requiring that the objection be raised administratively before it can be deemed "waived." *United States ex rel. Vajtauer* v. *Commissioner*, 273 U. S. 103.

It is true that by his belated motion to the Board of Immigration Appeals, after the argument in the Court of Appeals (*supra*, p. 5, n. 2), petitioner evidently sought to cure this defect *nunc pro tunc* and thereby avoid the *Tucker* doctrine. But, as this Court pointed out in *Tucker* (344 U. S. at 36), the objection should have been made before the administrative hearing tribunal (*i. e.*, the Board of Special Inquiry) and then again before the administrative appellate tribunal on its consideration of the appeal from the decision of that board. Despite the fact that the Board of Immigration Appeals appears to have decided that the Board of Special Inquiry was properly composed,[25] this fact should not

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is to proceedings before other administrative agencies. See *United States ex rel. Vajtauer* v. *Commissioner*, 273 U. S. 103, 113; *United States ex rel. Beck* v. *Neelly*, 202 F. 2d 221, 224 (C. A. 7), certiorari denied, 345 U. S. 997; *United States ex rel. Lombardo* v. *Bramblett*, 114 F. Supp. 183 (N. D. Ohio).

[25] In discussing its reasons for affirming its prior orders, the Board expressly referred to *Tucker* for the proposition

avail petitioner. For the correct course would be to require that objections to the qualifications of hearing examiners or administrative trial boards be made to those examiners or boards, rather than on appeal to the agency heads. Where the objection is made at the outset of the hearing when any error can be corrected, it may very well result—if it is well taken—in preventing the parties from going to the time and expense of conducting unnecessary hearings. Consideration for the unfairness inherent in subjecting the adverse parties in such proceedings to such expense should require that if the objection is not made to the board or examiner which actually hears the evidence, it is waived.

C. THE BOARD OF SPECIAL INQUIRY WAS NOT IMPROPERLY CONSTITUTED BY REASON OF THE FACT THAT ONE OF ITS MEMBERS WAS A CLERK-STENOGRAPHER

The record of the first day of hearing before the Board of Special Inquiry held on January 22, 1948, reflects that one of the three Board members, Luba Brondz, was also its Secretary.[26] The record does not show this member's official position in the Immigration and Naturalization Service, her Civil Service classification or title. When the hearing was resumed on February 24, 1949,

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that "where no objection was made before the agency to noncompliance with the Administrative Procedure Act, the validity of that agency's order cannot be judicially attacked on that ground" (Pet. Br. 49).

[26] Immigration File, Minutes, p. 1. See *supra*, n. 3, pp. 5–6.

the record reflects that M. Louise Elliott replaced Miss Brondz as Board Member and Secretary.[27] Although Miss Elliott's official position, Civil Service classification or title do not appear at this point, it is noted that her certification of the record recites that she was, at least for this purpose, a clerk-stenographer.

The Act requires (8 U. S. C. 153, Appendix, *infra*, pp. 50–51) that the Board members be "immigrant officials * * * designate[d] as qualified to serve on such boards" by the Commissioner of Immigration and Naturalization with the approval of the Attorney General.[28] Persons designated as qualified and eligible by the Commissioner, with the approval of the Attorney General, include (*a*) immigrant inspectors, and

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[27] As petitioner made no objection at the administrative hearing to the competency or qualification of either Secretary to sit as a member of the Board, the record before this Court is devoid of any evidence in this regard. The District Court found only (R. 9–10) that the Board of Special Inquiry was composed "of two immigration inspectors and the clerk-stenographer."

[28] That Congress contemplated that officials other than immigrant inspectors could sit on Boards of Special Inquiry is apparent from 8 U. S. C. 152 (Appendix, *infra*, pp. 49–50):

> * * * The inspection, other than the physical and mental examination, of aliens, including those seeking admission or readmission to or the privilege of passing through or residing in the United States, and the examination of aliens arrested within the United States under this section, shall be conducted by immigrant inspectors, *except as hereinafter provided in regard to boards of special inquiry.* * * * [Emphasis added.]

"(*b*) All other employees of the Immigration and Naturalization Service whose supervisory officers assign to them the duty of acting as secretaries of such boards * * *" 8 C. F. R. 60.29 (Appendix, *infra*. pp. 53–54).

Clearly, the two employees who sat successively as member and secretary of the Board of Special Inquiry in petitioner's case were within the ambit of this regulation. And the capacity of clerks and stenographers, designated as Secretaries of Boards of Special Inquiry, to sit as members of such Boards has been sustained by every court which has considered the question since it was first raised. See *United States ex rel. Minuto* v. *Reimer,* 83 F. 2d 166 (C. A. 2); *Dong Ying Fun* v. *Nagle,* 5 F. 2d 310 (C. A. 9); *Ex parte Hosaye Sakaguchi,* 277 Fed. 913 (C. A. 9); *Ex parte Momo Tomimatsu,* 232 Fed. 376 (N. D. Cal.).[29]

The fact is that there is no indication in the record that Miss Elliott did not have extensive

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[29] Petitioner's contentions to the contrary are, generally, those which were considered and rejected by the Court of Appeals for the Second Circuit in *United States ex rel. Minuto* v. *Reimer, supra,* which we believe completely disposes of his argument. Petitioner's attempted contrast of the statutory restriction of Board membership to immigrant "officials" in 8 U. S. C. 153 with the designation of immigration officials, officers, and clerks in 8 U. S. C. 108 and 109 (Appendix, *infra,* p. 49) is without merit. For example, 8 U. S. C. 108 refers only to "immigration officials in charge of districts, ports, or stations." Certainly the Board's membership of Boards is not limited to such a particularized group.

experience as a member of Boards of Special Inquiry or that she consequently was not just as qualified to act as a member of the instant board as an immigrant inspector. Obviously, the fact that she functioned as a competent stenographer and reporter does not necessarily indicate that—as assumed gratuitously by petitioner—she had "no qualifications other than that possessed by the ordinary stenographer or clerical employee in the Immigration Service" (Pet. Br. 28).

Moreover, Section 17 of the Immigration Act of 1917, 8 U. S. C. 153, which prescribed the composition of the Board of Special Inquiry in petitioner's case, was a reenactment of Section 25 of the Immigration Act of February 20, 1907, 34 Stat. 898. Section 25 provided for a three-member board, selected from "immigrant officials." Under the 1907 Act, clerical employees were sometimes selected as Board members. See *Ex parte Momo Tomimatsu, supra.* The composition and qualifications of such Boards were the subjects of critical scrutiny, and as early as 1911 it was proposed by the Immigration Commission that Section 25 of the 1907 Act be amended to require that such Boards be composed of "men whose ability and training qualify them for the performance of judicial functions." S. Doc. 747, 61st Cong., 3d Sess., p. 46. This recommendation went unheeded when Congress, in enacting the 1917 Act, cast Section 17 thereof in the same

terms as Section 25 of the 1907 Act, S. Rep. 352, 64th Cong., 1st sess., p. 13. Other studies subsequently noted the presence of clerical personnel as Board members,[30] but it was not until 1952 that Congress, in the Immigration and Nationality Act, made any change at all,[31] Secs. 101 (b) (4), 235 (b), 236 (a) (Appendix, *infra*, pp. 52–53). As this case arose under the 1917 Act, there most certainly was no impropriety in the composition of the Board.

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[30] See, for example, Van Vleck, *The Administrative Control of Aliens*, p. 46 (1932); S. Rep. 1515, 81st Cong., 2d sess., p. 618.

[31] The 1952 Act provides that a "special inquiry officer" is "any immigration officer who the Attorney General deems specially qualified to conduct specified classes of proceedings * * * required by this Act to be conducted by or before a special inquiry officer" (Sec. 101 (b) (4)); that every alien who may not appear eligible for admission "shall be detained for further inquiry to be conducted by a special inquiry officer" (Sec. 235 (b)); and that "A special inquiry officer shall conduct [exclusion] proceedings * * *" and "shall have authority in any case to determine whether an arriving alien * * * shall be allowed to enter or shall be excluded and deported" (Sec. 236 (a)); it further provides that "No special inquiry officer shall conduct a proceeding in any case" where he has participated in the investigation or prosecution, and "Proceedings before a special inquiry officer under this section shall be conducted in accordance with this section, the applicable provisions of sections 235 and 287 (b), and such regulations as the Attorney General shall prescribe, and shall be the sole and exclusive procedure for determining admissibility of a person to the United States under the provisions of this section." (*Ibid.*)

D. THE BOARD OF SPECIAL INQUIRY WAS NOT IMPROPERLY CONSTITUTED BY REASON OF CHANGE OF PERSONNEL, AND SUCH SUBSTITUTION DID NOT RENDER THE HEARING UNFAIR

The lower courts have uniformly held that changes in Board of Special Inquiry membership do not render the Board incompetent or make its hearings unfair. See *United States ex rel. Minuto* v. *Reimer, supra; Dong Ying Fun* v. *Nagle, supra; United States ex rel. Chin Cheung Nai* v. *Corsi,* 55 F. 2d 360 (S. D. N. Y.), affirmed, 64 F. 2d 1022 (C. A. 2); *Louie Lung Gooey* v. *Nagle,* 49 F. 2d 1016 (C. A. 9); *Hom Moon Ong* v. *Nagle,* 32 F. 2d 470 (C. A. 9).[32] And credibility was as much the essential issue in these cases as it was here. See, for example, *Louie Lung Gooey* v. *Nagle, supra.* And see *Quon Quon Poy* v. *Johnson,* 273 U. S. 352, where this Court sustained an exclusion decision of a Board of Special Inquiry, two of whose members had never seen important pedigree witnesses whose depositions were considered. Where, as here, the new members were thoroughly familiar with the evidence which had already been adduced,[33] and the

[32] And see, with respect to proceedings before other administrative agencies, *Morgan* v. *United States,* 298 U. S. 468; *Empire Trails, Inc.* v. *United States,* 53 F. Supp. 373 (D. D. C.); *Visceglia* v. *United States,* 24 F. Supp. 355 (S. D. N. Y.); *Eastland Co.* v. *Federal Communications Commission,* 92 F. 2d 467 (C. A. D. C.), certiorari denied, 302 U. S. 735; *Twin City Milk Producers Assn.* v. *McNutt,* 122 F. 2d 564 (C. A. 8).

[33] The new Board members had of course familiarized themselves with the evidence at the first Board of Special

cold record so clearly indicates that the petitioner's testimony was just not credible,[34] no prejudice or unfairness results from a change in the composition of the Board.

E. PROCEEDINGS BEFORE THE BOARD OF SPECIAL INQUIRY WERE NOT GOVERNED BY THE ADMINISTRATIVE PROCEDURE ACT

Section 7 (a) of the Administrative Procedure Act (5 U. S. C. 1006 (a), Appendix, *infra*, p. 47), which pertains to the designation of hearing officers, provides that "nothing in this Act shall be deemed to supersede the conduct of specified classes of proceedings in whole or part by or before boards or other officers specially provided for by or designated pursuant to statute." The lower federal courts accordingly have been unanimous in holding the exemption applicable to the designation of hearing officers in exclusion proceedings. See *United States ex rel. Saclarides* v. *Shaughnessy*, 180 F. 2d 687 (C. A. 2); *United States ex rel. Frisch* v. *Miller*, 181 F. 2d 360 (C. A. 5); *United States ex rel. Johnson* v. *Watkins*, 170 F. 2d 1009 (C. A. 2), reversed on other grounds *sub nom. United States ex rel. Johnson* v. *Shaughnessy*, 336 U. S. 806; *Wah* v. *Shaughnessy*, 190 F. 2d 488 (C. A. 2); *Ex parte Wong So Wan*, 82 F. Supp. 60 (N. D. Cal.).

In *Wong Yang Sung* v. *McGrath*, 339 U. S. 33, this Court held that deportation proceedings were

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Inquiry hearing. Immigration File, Minutes, p. 24. See *supra*, n. 3, pp. 5–6.

[34] See *infra*, pp. 43–45.

not within the exemption under consideration. The Court stated, however (339 U. S. at 52):

> Section 7 (a) qualifies as presiding officers at hearings the agency and one or more of the members of the body comprising the agency, and *it also leaves untouched any others whose responsibilities and duties as hearing officers are established by* other statutory provision. * * * [Emphasis added.]

Exclusion proceedings are within the jurisdiction of Boards of Special Inquiry, whose members were established by just such another statutory provision; *viz,* Section 17 of the Immigration Act of 1917, 8 U. S. C. 153. That statute was not merely an authorization to appoint to Boards of Special Inquiry such immigration officials as may be designated by the Commissioner, but a statutory command that the Boards be so constituted. Clearly, therefore, Boards of Special Inquiry were "boards * * * specially provided for by or designated pursuant to statute" within the meaning of Section 7 (a), and consequently need not have been composed of examiners appointed in accordance with Section 11 of the Administrative Procedure Act, 5 U. S. C. 1010 (Appendix, *infra,* pp. 48–49).

The legislative history of Section 7 (a) accords with this construction and is consistent with the general policy of the Act, the object of which was to regulate procedures developed by the ad-

ministrative agencies in the exercise of their discretionary authority. Its sponsors affirmatively disclaimed any intention to disturb procedures theretofore specifically prescribed by Congress itself.[35] Indeed, any other construction of Section 7 (a) would render meaningless the excepting language, "* * * but nothing in this Act shall be deemed to supersede the conduct of specified classes of proceedings in whole or part by or before boards or other officers specially provided for by or designated pursuant to statute."

The purpose of the exception to Section 7 (a) is "to preserve special statutory types of hearing officers who contribute something more than examiners could contribute." S. Doc. 248, 79th Cong., 2d Sess., p. 216. Petitioner contends, however, that Board of Special Inquiry members did not possess the expertise which prompted the exemption contained in Section 7 (a). He argues that immigrant inspectors were not required to have any special training as lawyers and asserts that the secretary who sat as a Board member merely had stenographic experience with the Immigration Service. But the expertise required for the examination of aliens applying for admission is not dependent on possession of a law degree. It is obvious that long experience in examining and

[35] See statements of Senator McCarran, Chairman of the Senate Judiciary Committee, in charge of the bill (S. 7). 92 Cong. Rec. 2152, 2154; S. Doc. 248, 79th Cong., 2d sess., pp. 307, 311.

dealing with aliens may endow an immigration employee with that peculiar proficiency to deal with such cases which is considered expertise. See *West Indian Co.* v. *Root,* 151 F. 2d 493, 497 (C. A. 3). Conceivably, Congress may have considered such experience a better qualification for membership on a Board of Special Inquiry than the capacity to perform judicial functions, when it rejected the proposal of the Immigration Commission in 1911 (*supra,* pp. 35–36).[38]

This analysis also disposes of petitioner's further contention—that the composition of the Board of Special Inquiry violated the separation of functions requirements of Section 5 (c) of the Administrative Procedure Act, 5 U. S. C. 1004 (c) (Appendix, *infra,* pp. 46–47). For, since "nothing in this Act shall be deemed to supersede the conduct of specified classes of proceedings in whole or part by or before boards or other officers

[38] It was not the intention of Congress that deportation or exclusion proceedings should be governed by the hearing requirements of the Administrative Procedure Act. When this Court held, in *Wong Yang Sung, supra,* that the Act was applicable to deportation hearings, Congress promptly enacted legislation, 8 U. S. C., Supp. V, 155a (Appendix, *infra,* p. 51), which exempted not only deportation but also exclusion proceedings. As respects the latter, this action was evidently taken out of a superabundance of caution, since no court had then (or has yet) found the Administrative Procedure Act applicable to Boards of Special Inquiry. This legislative action may thus indicate a deep-rooted determination that exclusion proceedings be left in the form in which they were cast in the immigration statutes.

specially provided for by or designated pursuant to statute" (Section 7 (a)), it follows that the separation of functions provisions of Section 5 (c) are no more applicable to proceedings before Boards of Special Inquiry than are the examiner provisions of Sections 7 (a) and 11.[37]

### F. THE ADMINISTRATIVE HEARING WAS FAIR AND THE DECISION WAS AMPLY SUPPORTED BY THE EVIDENCE

In support of his contention that the hearing was unfair, petitioner points to the fact that the Chairman of the Board of Special Inquiry dom-

[37] Moreover, Section 5 (c) provides that that subsection "shall not apply in determining applications for initial licenses." The term "license" is defined in Section 2 (e) of the same Act, 5 U. S. C. 1001 (e) (Appendix, *infra*, p. 46), as including "the whole or part of any agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission." Seeking to enter the United States would seem to involve an application for a license within the broad and functional definition of Section 2 (e). The phrase "determining applications for initial licenses" in Section 5 (c) refers to the grant or denial of an application for a license, as opposed to such matters as the revocation or suspension of licenses. See Attorney General's Manual on the Administrative Procedure Act (1947), pp. 50–53. Accordingly, proceedings of Boards of Special Inquiry in determining whether aliens are entitled to be admitted into the United States would appear to involve the determination of "applications for initial licenses" and are therefore outside the scope of Section 5 (c).

On this score, petitioner errs when he asserts (Brief p. 37) that the initial permission to enter the United States is granted by an American Consul abroad. The visa issued by an American Consul to an alien abroad confers no right of entry, 8 U. S. C. 202 (g); *Chang Chan* v. *Nagle*, 268 U. S. 346, 352; *Sohaiby* v. *Savoretti*, 195 F. 2d 139, 140 (C. A. 5).

inated the hearing, asked all the questions, and expressed incredulity at some of petitioner's answers. However, the other members of the Board had ample opportunity to ask questions, if they wished. That they did not is not surprising, in view of the thoroughness with which the Chairman had already covered the ground. As for the Chairman's expressions of disbelief at some of petitioner's testimony, this, too, is not surprising in view of the contradictory nature of that testimony.

Impartial review of the record before the Board of Inquiry[38] will reflect that there was ample evidence to sustain the Board's fact-finding that petitioner's claimed relationship to his alleged father was not satisfactorily established. The Board's detailed discussion of the evidence reveals clearly the inadequacies of petitioner's proof.

Thus, the Board pointed out that there was no satisfactory evidence presented which showed that the alleged father of the petitioner had been in China at a time which would have made possible his paternity to the petitioner; that at no time prior to 1946 had the alleged father ever represented that he was married or had a son, and that, in fact, in both his Selective Service questionnaire and his 1941 income tax return, petitioner's alleged father had affirmatively indicated that he

[38] Immigration file, Minutes, pp. 1–25; see *supra*, n. 3, pp. 5–6.

was single. The Board further found that the testimony of the only witness called on petitioner's behalf was seriously inconsistent with that of the petitioner, in the description of the village in which petitioner claimed to have been born and lived, of the school in which he claimed to have been taught, and of persons who should have been known to him, and that testimony of this witness, rather than that of petitioner, was confirmed by collateral evidence. The Board also pointed out serious discrepancies between the answers which petitioner's alleged father had given to questions prior to the hearing and those of the petitioner himself. Thus, petitioner claimed that his family owned farmland in China, but petitioner's alleged father stated that the family had never owned any land. Petitioner's identification of his relatives was not only completely unsatisfactory, but was also inconsistent with that of his alleged father. Finally, petitioner's testimony as to correspondence with his alleged father was at material variance with that of his alleged father.[39] It might fairly be stated that every important phase of petitioner's testimony was shown to be without foundation, both by his own internal contradictions and by the testimony of his alleged father and that of the sole other supporting witness. As the Chairman summarized the evidence, "I do not believe that

[39] *Id.*, pp. 26–31.

the evidence presented and adduced has reasonably established the relationship claimed."

Both courts below were well warranted in concluding that the evidence adequately justified the Board's action.

## CONCLUSION

For the reasons set forth in Sections I and II of this brief, the judgment of the court below should be vacated and the case remanded to the District Court with instructions to dismiss the complaint for want of jurisdiction.

Respectfully submitted.

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NOVEMBER 1953.

# APPENDIX

## ADMINISTRATIVE PROCEDURE ACT, 60 STAT. 237

Sec. 2 (e), 5 U. S. C. 1001 (e):

"License" includes the whole or part of any agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission. "Licensing" includes agency process respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation amendment, modification, or conditioning of a license.

Sec. 5 (c), 5 U. S. C. 1004 (c):

The same officers who preside at the reception of evidence pursuant to section 7 shall make the recommended decision or initial decision required by section 8 except where such officers become unavailable to the agency. Save to the extent required for the disposition of ex parte matters as authorized by law, no such officer shall consult any person or party on any fact in issue unless upon notice and opportunity for all parties to participate; nor shall such officer be responsible to or subject to the supervision or direction of any officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency. No officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency in any case shall, in that or a factually related case, participate or ad-

vise in the decision, recommended decision, or agency review pursuant to section 8 except as witness or counsel in public proceedings. This subsection shall not apply in determining applications for initial licenses or to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers; nor shall it be applicable in any manner to the agency or any member or members of the body comprising the agency.

Sec. 7 (a), 5 U. S. C. 1006 (a):

In hearings which section 4 or 5 requires to be conducted pursuant to this section:

(a) There shall preside at the taking of evidence (1) the agency, (2) one or more members of the body which comprises the agency, or (3) one or more examiners appointed as provided in this Act; but nothing in this Act shall be deemed to supersede the conduct of specified classes of proceedings in whole or part by or before boards or other officers specially provided for by or designated pursuant to statute. The functions of all presiding officers and of officers participating in decisions in conformity with section 8 shall be conducted in an impartial manner. Any such officer may at any time withdraw if he deems himself disqualified; and, upon the filing in good faith of a timely and sufficient affidavit of personal bias or disqualification of any such officer, the agency shall determine the matter as a part of the record and decision in the case.

Sec. 10 (a), 5 U. S. C. 1009 (a):

Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—

(a) Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

Sec. 11, 5 U. S. C. 1010:

Subject to the civil-service and other laws to the extent not inconsistent with this Act, there shall be appointed by and for each agency as many qualified and competent examiners as may be necessary for proceedings pursuant to sections 7 and 8, who shall be assigned to cases in rotation so far as practicable and shall perform no duties inconsistent with their duties and responsibilities as examiners. Examiners shall be removable by the agency in which they are employed only for good cause established and determined by the Civil Service Commission (hereinafter called the Commission) after opportunity for hearing and upon the record thereof. Examiners shall receive compensation prescribed by the Commission independently of agency recommendations or ratings and in accordance with the Classification Act of 1923, as amended, except that the provisions of paragraphs (2) and (3) of subsection (b) of section 7 of said Act, as amended, and the provisions of section 9 of said Act, as amended, shall not be applicable. Agencies occasionally or temporarily insufficiently staffed may utilize examiners selected by the Commission from and with the consent of other

agencies. For the purposes of this section, the Commission is authorized to make investigations, require reports by agencies, issue reports, including an annual report to the Congress, promulgate rules, appoint such advisory committees as may be deemed necessary, recommend legislation, subpena witnesses or records, and pay witness fees as established for the United States courts.

IMMIGRATION ACT OF 1917, AS AMENDED

8 U. S. C. 108:

The duties of immigration officials in charge of districts, ports, or stations shall be of an administrative character, to be prescribed in detail by regulations prepared under the direction or with the approval of the Attorney General.

8 U. S. C. 109:

Immigrant inspectors and other immigration officers, clerks, and employees shall be appointed and their compensation fixed and raised or decreased from time to time by the Attorney General, upon the recommendation of the Commissioner of Immigration and Naturalization and in accordance with the provisions of sections 632, 633, 635, 637, 638, and 640–542 of Title 5 * * *.

8 U. S. C. 152:

The physical and mental examination of all arriving aliens shall be made by medical officers of the United States Public Health Service who shall conduct all medical examinations and shall certify, for the information of the immigration officers and the boards of special inquiry hereinafter provided for, any and all physical and

mental defects or diseases observed by said medical officers in any such alien; * * *. The inspection, other than the physical and mental examination, of aliens, including those seeking admission or readmission to or the privilege of passing through or residing in the United States, and the examination of aliens arrested within the United States under this section, shall be conducted by immigrant inspectors, except as hereinafter provided in regard to boards of special inquiry. * * * Every alien who may not appear to the examining immigrant inspector at the port of arrival to be clearly and beyond a doubt entitled to land shall be detained for examination in relation thereto by a board of special inquiry.

8 U. S. C. 153:

Boards of special inquiry shall be appointed by either the district director of immigration and naturalization designated by the Commissioner or by the inspector in charge at the various ports of arrival as may be necessary for the prompt determination of all cases of immigrants detained at such ports under the provisions of the law. Each board shall consist of three members, who shall be selected from such of the immigrant officials in the service as the Commissioner of Immigration and Naturalization, with the approval of the Attorney General, shall from time to time designate as qualified to serve on such boards. When in the opinion of the Attorney General the maintenance of a permanent board of special inquiry for service at any sea or land border port is not warranted, regularly constituted boards may be detailed from other stations for

temporary service at such port, or, if that be impracticable, the Attorney General shall authorize the creation of boards of special inquiry by the immigration and naturalization officials in charge at such ports, and shall determine what Government officials or other persons shall be eligible for service on such boards. Such boards shall have authority to determine whether an alien who has been duly held shall be allowed to land or shall be deported. * * * In every case where an alien is excluded from admission into the United States, under any law or treaty now existing or hereafter made, the decision of a board of special inquiry adverse to the admission of such alien shall be final, unless reversed on appeal to the Attorney General. * * *

8 U. S. C., Supp. V, 155a:

Proceedings under law relating to the exclusion or expulsion of aliens shall hereafter be without regard to the provisions of [sections 5, 7, and 8 of the Administrative Procedure Act] sections 1004, 1006, and 1007 of Title 5.

8 U. S. C. 232:

Notwithstanding any of the several clauses of section 136 of this title, excluding physically and mentally defective aliens, and notwithstanding the documentary requirements of any of the immigration laws or regulations, Executive orders, or Presidential proclamations issued thereunder, alien spouses or alien children of United States citizens serving in, or having an honorable discharge certificate from the armed forces of the United States during the Second World War shall, if other-

wise admissible under the immigration laws and if application for admission is made within three years of December 28, 1945, be admitted to the United States: * * *.

IMMIGRATION AND NATIONALITY ACT OF 1952, 66 STAT. 163

Sec. 101 (b) (4):

The term "special inquiry officer" means any immigration officer who the Attorney General deems specially qualified to conduct specified classes of proceedings, in whole or in part, required by this Act to be conducted by or before a special inquiry officer and who is designated and selected by the Attorney General, individually or by regulation, to conduct such proceedings. Such special inquiry officer shall be subject to such supervision and shall perform such duties, not inconsistent with this Act, as the Attorney General shall prescribe.

Sec. 235 (b):

Every alien (other than an alien crewman), and except as otherwise provided in subsection (c) of this section and in section 273 (d), who may not appear to the examining immigration officer at the port of arrival to be clearly and beyond a doubt entitled to land shall be detained for further inquiry to be conducted by a special inquiry officer. The decision of the examining immigration officer, if favorable to the admission of any alien, shall be subject to challenge by any other immigration officer and such challenge shall operate to take the alien, whose privilege to land is so challenged, before a special inquiry officer for further inquiry.

**Sec. 236 (a):**

A special inquiry officer shall conduct proceedings under this section, administer oaths, present and receive evidence, and interrogate, examine, and cross-examine the alien or witnesses. He shall have authority in any case to determine whether an arriving alien who has been detained for further inquiry under section 235 shall be allowed to enter or shall be excluded and deported. The determination of such special inquiry officer shall be based only on the evidence produced at the inquiry. No special inquiry officer shall conduct a proceeding in any case under this section in which he shall have participated in investigative functions or in which he shall have participated (except as provided in this subsection) in prosecuting functions. Proceedings before a special inquiry officer under this section shall be conducted in accordance with this section, the applicable provisions of sections 235 and 287 (b), and such regulations as the Attorney General shall prescribe, and shall be the sole and exclusive procedure for determining admissibility of a person to the United States under the provisions of this section. At such inquiry, which shall be kept separate and apart from the public, the alien may have one friend or relative present, under such conditions as may be prescribed by the Attorney General. A complete record of the proceedings and of all testimony and evidence produced at such inquiry shall be kept.

**8 C. F. R. 60.29:**

*Persons qualified as members of boards of special inquiry; oath.*—In accordance

with the provisions of section 17 of the Immigration Act of 1917 (39 Stat. 887; 8 U. S. C. 153), the following persons are hereby designated as qualified and determined to be eligible to serve on boards of special inquiry:

(a) Immigrant inspectors, including persons designated immigrant inspectors by § 60.27;

(b) All other employees of the Immigration and Naturalization Service whose supervisory officers assign to them the duty of acting as secretaries of such boards for the purpose of keeping the complete permanent record of the proceedings and of all such testimony as may be produced; and

(c) Persons, other than employees of the Immigration and Naturalization Service but preferably Government employees, who are selected by an Immigration and Naturalization Service official in charge of a port where no permanent board of special inquiry is maintained and to which it is impracticable to detail a board from some other station. Such persons shall, before serving on a board of special inquiry, subscribe to an oath of office on Form I–266 before an immigrant inspector.

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